IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.2432 OF 2006

Smt.Laxmibai w/o Vasant
Kumbhar and Anr. .. Petitioners.
Vs.
Sambha Nivrutti Kumbhar
since deceased by his LRs
and Others. .. Respondents.

Mr.S.S.Patwardhan for the petitioners.
Mr.Ajay Joshi for the respondents.

CORAM : D.B.BHOSALE, J.

DATED : 19TH SEPTEMBER, 2006

P.C.:

. Heard learned counsel for the petitioner and the respondent.

2. Rule, returnable forthwith. By consent of the parties taken up for final hearing. Mr.Joshi, learned counsel waives service for the respondents.

3. This petition challenges the order dated 21.2.2006 by which the petitioners' application under Order 6 Rule 17 seeking amendment of the plaint has been rejected. The amendment was rejected on two grounds. Firstly, the amendment/relief, restraining the defendants from taking 1/2 share from the well

water situated in Gat No.670, sought to be introduced is already mentioned in paragraph 2 of the plaint, and secondly, on the ground of limitation.

4. Recently, the Supreme Court in **Balasaria Construction (P) Ltd. Vs. Hanuman Seva Trust and Others. (2006) 5 SCC 658** has reiterated the well settled principle of law that the question of limitation is a mixed question of law and fact and ex-facie on the reading of the plaint it cannot be held that the suit is barred by the limitation. In other words, the suit could not be dismissed as barred by the limitation without proper pleadings, framing of an issue of limitation and taking of evidence. Similarly, in **Raghu Thilak D.John Vs. S.Rayappan and Others (2001) 2 SCC 472**. The Apex Court after referring to its judgment in **B.K.Narayana Pillai Vs. Parameswaran Pillai (2000) 1 SCC 712** has observed that the dominant purpose of allowing the amendment is to minimise the litigation. The plea that the relief sought by way of amendment was barred by time is arguable being disputed and it could be made a subject-matter of the issue after allowing the amendment prayed for. In view of the settled position in law the learned Judge ought not to have rejected the amendment on the ground of limitation. The plea that the relief sought by way of amendment was barred

by the time in the present case is arguable in the circumstances of the case and it could be a subject-matter of the issue after allowing the amendment prayed for. Insofar as the first ground for rejecting the amendment holding that in effect the averments, sought to be introduced, already exist in the plaint is concerned, I see no reason why it should be denied solely on that ground. Looking to the reasons recorded by the court below even this part of amendment, in my opinion, will not cause any prejudice to the respondents. In the circumstances I am satisfied that the following order shall meet the ends of justice:

(a) The impugned order dated 21.2.2006 is quashed and set aside. The petitioners to carry out amendment within two weeks from the date of receipt of this order subject to payment of cost of Rs.500/- to be paid to the respondent-defendant.

(b) The plea of limitation is kept open and could be made a subject-matter of the issue to be decided in the course of the trial.

(c) It is open for the respondent-defendant to file additional written statement, if any, within four weeks from the date of carrying out the amendment.

(d) The trial Court shall endeavour to dispose of the suit as expeditiously as possible and preferrably within a period of eight months from the date of receipt of this order.

(e) The parties are directed to co-operate disposal of the suit within time frame.

. Rule is disposed of in the aforesaid terms. No costs.

(D.B.Bhosale, J.)